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No. 91-656

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

VS.

MELVIN BANKS,

Respondent

On Petition for a Writ of Certiorari
to the Supreme Court
of the State of Michigan

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTER QUESTION PRESENTED

WHEN A STATE APPELLATE DECISION RESTS ON AN ADEQUATE FOUNDATION OF STATE SUBSTANTIVE LAW, DOES THE PRINCIPLE OF FEDERALISM RENDER THE STATE DECISION IMMUNE FROM REVIEW ON CERTIORARI?

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Melvin Banks, respondent, by his attorney, Carl Ziemba, makes the following Response to Petition for a Writ of Certiorari and prays this Court deny same.

OPINIONS BELOW

The Opinion of the Michigan Supreme Court which is the center of controversy here has been printed in Petitioner's Appendix to Petition for a Writ of Certiorari and perhaps need not be set forth here.

STATEMENT OF JURISDICTION

Petitioner claims that this Court has jurisdiction under 28 USC 1257(3).

Respondent challenges the claim of petitioner that the judgment of the Michigan Supreme Court rests solely on United States Constitution and asserts, rather, that the judgment of the Michigan Supreme Court rests on an adequate foundation of Michigan Constitutional law, to wit, Section 20, Article 1, Michigan Constitution 1963 and that it is immune from review on certiorari upon principles of federalism.

STATE CONSTITUTIONAL PROVISION INVOLVED

Section 20, Article 1, Michigan Constitution 1963 reads as follows:

'In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than a year; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defense; to have an appeal as a matter of right; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.' [emphasis added]

REASONS FOR DENYING THE WRIT

The following are reasons why the Court should deny the Petition for Certiorari:

I. The decision of the Michigan Supreme Court rested upon an adequate independent state ground, namely, Michigan Constitution 1963, Article 1, Section 20.

II. A jury will not or cannot follow limiting instructions of the trial court regarding the confession of a non-testifying co-defendant even when the name of the defendant is replaced by a symbol in a case where the prosecutor in his argument to the jury supplies for the jury the name of the defendant in place of the symbol.

III. The Bruton error in this case cannot be deemed harmless where it is clear that the jury acquitted the two non-testifying co-defendants solely on the basis of their 'confessions' in which they exonerated themselves and named the respondent as the culprit.

I.

The Michigan Supreme Court held in its opinion that:

'We hold that admission of the redacted state-

ments denied defendant his right of confrontation guaranteed by US Const, Am VI and Const 1963, art 1, s 20.' [emphasis added]

People v Banks, 438 Mich 408, 411 (1991). See pp 1a-2a, Appendices, Petition for Writ of Certiorari.

Justice Brennan stated in dissent in Oregon v Hass, 420 US 714, 727 (1975) that

'Where we have been unable to say with certainty that the judgment rested solely on federal law grounds, we have refused to rule on the federal issue in the case; . . .'

And in United States v Miller, 425 US 435, 454 (1976), Justice Brennan in dissent stated:

'I add only that Burrows strikingly illustrates the emerging trend among the high state courts of relying upon state constitutional protections of individual liberties - protections pervading counterpart provisions of the United States Constitution, but increasingly being ignored by decisions of this Court.' [footnote omitted]
In Oregon v Hass, 420 US 714, 719 (1975), the Court reiterated the principle that

'a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards'

and went on to hold that in that case that

'the present case was decided by the Oregon courts on Fifth and Fourteenth Amendment ground. The decision did not rest on the Oregon Constitution or state law; neither was cited.'

In Fox Film Corporation v Muller, 296 US 207, 210 (1935), this Court said:

'[T]he settled rule [is] that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.'

In the case now before the Court, the Michigan Supreme Court expressly and unequivocally stated that its decision was based on both the federal constitution and the Michigan Constitution. Thus, even if this Court should decide that the Michigan Supreme Court incorrectly interpreted the Sixth Amendment to the United States Constitution, the judgment of the Michigan Supreme Court would stand because its judgment was based upon its interpretation of the Michigan Constitution of 1963, Article 1, Section 20.

Section 20, Article 1, Michigan Constitution 1963 reads as follows:

'In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than a year; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defense; to have an appeal as a matter of right; and as provided by

law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.' [emphasis added]

II.

The underlying rationale of the decision in Bruton v United States, 391 US 123 (1968) was rather simple and straightforward: it is intolerable for the prosecution to present to the jury a confession of a non-testifying co-defendant in which he accuses the defendant of committing the crime because the defendant has no opportunity to test the credibility of the co-defendant's accusations through cross-examination. And it is utterly futile for the trial judge to tell the jury that they can't use the co-defendant's confession as evidence against the defendant because a lay juror cannot perform the mental gymnastics necessary to cleanse his mind of the pollution of the accusations contained in the confession.

In effect the state prosecutor is telling the Court in the case now before the Court that there was no Bruton violation because the name of the defendant was excised from the statements of the two non-testifying co-defendants and replaced by the word 'blank', thus removing any

danger that the jury would figure out that 'blank' really meant the defendant and that it was the defendant who was the shooter.

But, what the state prosecutor failed to point out to the court in his Petition was that the state trial prosecutor in his argument to the jury pointed out precisely who was meant by 'blank' in the two statements.

The Michigan Supreme Court recognized this fact; in its opinion, that Court stated:

'The prosecutor drew a vivid picture for the jury: There were three persons in the car - Burley, Punches and the defendant, but it was the third person in the car who did the shooting.' Id, 438 Mich at 425.

And the Michigan Supreme Court pointed out that both counsel for the two non-testifying co-defendants also in argument to the jury helped the jurors insert the name of respondent in place of the 'blank's. And the Court concluded that:

'The explicit accusations made against the defendant in these closing arguments leave no doubt that the redaction was totally ineffective in buffering the defendant from the prejudicial effects of the admitted statements. Under the circumstances, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limita-

tions of the jury system cannot be ignored". Bruton, supra, p 135.' Id, 328 Mich at 408.

III.

Invoking Chapman v California, 386 US 18, 24 (1967), the Michigan Supreme Court held that the Bruton error was not harmless.

The Court held:

'[W]e conclude that the "minds of an average jury" would have found the prosecution's case "significantly less persuasive" had the statements of the codefendants been excluded. Schneble, supra, p 432. There is a very real possibility that the improperly admitted statements swayed the jury. The testimony of the three companions, while damaging to the defendant, would have born (sic) considerably less weight in the context of the defendant's defense of misidentification, without the accusations of defendant by Funches and Burley.' Id, 438 Mich at 430-431.

Did the jury rely on the two statements of the non-testifying co-defendants in resolving the factual issues in the case?

It is clear that the jury did. The only evidence adduced on trial exonerating the two non-testifying defendants were their own self-serving statements in which each exonerated

himself and heaped all of the blame upon respondent.

It is clear that the error was not harmless.

CONCLUSION

Respondent respectfully prays this Court deny the Petition for Certiorari filed in this case.

Respectfully submitted,

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Detroit, Michigan
December 27, 1991